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No. 76-979

In the Supreme Court of the United States

OCTOBER TERM, 1976

ARTHUR G. McKEE & COMPANY,
Petitioner,

v.

G.C.S., INC., I.S.C., INC., McJUNKIN CORPORATION, and the HON. DANIEL J. SNYDER, JR., United States District Judge for the Western District of Pennsylvania,
Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE GRANT OF A WRIT OF CERTIORARI

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TABLE OF CONTENTS

PAGE

Statement of Additional Facts 1

Argument 3

I. The Forum-Selection Clause Applies To The Third-Party Action Below 3

II. G.C.S. Has Erroneously Characterized The District Court's Orders As Discretionary Rulings On Requests For Severance, Stay, or Transfer 3

III. The Third Circuit Did Not Dismiss McKee's Appeal For Untimeliness 6

Conclusion 7

APPENDICES

Appendix 1A—Excerpt from Assignment of McJunkin Valve Purchase Order to G.C.S., dated April 22, 1974 .....App. 1a

Appendix 2A—Excerpts from McKee-G.C.S. Subcontract, dated April 25, 1974 .....App. 2a

Appendix 3A—Excerpts from Hearing on April 30, 1976 in Pittsburgh, Pennsylvania before the United States District Court for the Western District of Pennsylvania .....App. 3a

CITATIONS

PAGE

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953) 7

The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) 4-7

Ellicott Mach. Corp. v. Modern Welding Co., 502 F.2d 178 (4th Cir. 1974) 5

The Plum Tree, Inc. v. Stockment, 488 F.2d 754 (3d Cir. 1973) 5

Roach v. Hapag-Lloyd, A.G., 358 F. Supp. 481 (N.D. Cal. 1973) 4

Torockio v. Chamberlain Mfg. Co., 456 F.2d 1084 (3d Cir.) (en banc), *on remand*, 56 F.R.D. 82 (W.D. Pa. 1972), *aff'd without opinion*, 474 F.2d 1340 (3d Cir. 1973) 6

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Statement of Additional Facts

In its Brief in Opposition (at 4), G.C.S.* states:

> "Subsequent to the execution of [the McKee-G.C.S.] subcontract, McKee assigned its valve purchase order with McJunkin to G.C.S."

This is not true. On April 22, 1974, McKee assigned its valve purchase order with McJunkin to G.C.S. (App. 1a). On April 25, 1974, the McKee-G.C.S. subcontract was executed. (App. 2a). As correctly represented in the Peti-

*As in the Petition, we denominate respondents G.C.S., Inc. and I.S.C., Inc. together as "G.C.S." throughout this Reply Brief.

tion (at 5), G.C.S. expressly accepted the purchase order assignment as part of the McKee-G.C.S. subcontract. (App. 2a).

G.C.S. also states that Judge Snyder "has repeatedly assured all counsel, that trial of this case will not involve issues unrelated to the valve purchase order." (G.C.S. Brief, at 6). In fact, Judge Snyder has expressed doubt as to whether the trial could be so limited. (App. 4a, 7a, 8a).

To ensure that there is no misunderstanding as to what the basis for Judge Snyder's rulings was, we have printed in Appendix 3A the relevant portions of both McKee and G.C.S.'s arguments during the April 30, 1976 hearing on McKee's motion for enforcement of the McKee-G.C.S. forum-selection clause, the only hearing held in the district court. McKee directs the Court's attention particularly to one additional point in the transcript: Judge Snyder's statement recognizing that the effect of his ruling is to permit G.C.S. to use the device of a third-party complaint to try twice the claims asserted in its third-party complaint. (App. 6a).

ARGUMENT

I.

THE FORUM-SELECTION CLAUSE APPLIES TO THE THIRD-PARTY ACTION BELOW.

In suggesting that the McKee-G.C.S. forum-selection clause does not cover claims asserted in the third-party complaint below, G.C.S. is careful to quote the clause out of context. (G.C.S. Brief, at 13). As we pointed out in the Petition (at 7, 14), the plain language of the clause includes disputes which arise out of the McKee-G.C.S. subcontract and which involve third-parties. Judge McMillen noted that the McKee-G.C.S. valve dispute arose out of their subcontract (App. 17), and even Judge Snyder conceded that the third-party action was part of the larger McKee-G.C.S. contract dispute. (App. 13, 5a, 7a; *see* Petition, at 14). Moreover, as the Additional Statement of Facts above demonstrates, G.C.S. accepted total payment responsibility for valves as an express provision of the McKee-G.C.S. subcontract. (App. 2a).

II.

G.C.S. HAS ERRONEOUSLY CHARACTERIZED THE DISTRICT COURT'S ORDERS AS DISCRETIONARY RULINGS ON REQUESTS FOR SEVERANCE, STAY, OR TRANSFER.

In opposing the Petition, G.C.S. contends that since rulings on motions for severance, stay, or transfer of a lawsuit are traditionally within a trial court's discretion, the

rulings of the courts below may not be reviewed. (G.C.S. Brief, at 11-13). But what McKee seeks is enforcement of an agreement between itself and G.C.S. that all disputes arising out of the McKee-G.C.S. subcontract will be decided in one forum. That McKee seeks *relief* under the clause which would otherwise be discretionary does not alter this Court's holding in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972), that a forum-selection clause should be enforced absent a showing by the party seeking to escape the contract that enforcement would be unreasonable or unjust.

Roach v. *Hapag-Lloyd, A.G.*, 358 F. Supp. 481 (N.D. Cal. 1973) illustrates this point. In *Roach*, a longshoreman sued a shipowner for injuries incurred when some cargo fell on the longshoreman. The shipowner impleaded the cargo-owner for negligently packing the cargo. The manufacturer moved to dismiss the third-party complaint on the ground that the bill of lading for the cargo contained a forum-selection clause which required all disputes between the shipowner and the manufacturer to be resolved in Hamburg, Germany. 358 F. Supp. at 482.

As G.C.S. has done below (*see* App. 7a), the shipowner resisted dismissal on grounds that the third-party complaint arose out of its defense to the longshoreman's suit. Applying the *Bremen* rule, the district court dismissed the third-party complaint on grounds that the shipowner had not met its burden of "clearly show[ing]" that enforcement of the clause would be unreasonable or unjust. 358 F. Supp. at 484. As the decisions below reveal, the lower courts have not applied the *Bremen* test to McKee's request for enforcement of the McKee-G.C.S. forum-selection clause. It is their refusal to do so that McKee seeks to have reviewed.

Nor does *The Plum Tree, Inc.* v. *Stockment*, 488 F.2d 754 (3d Cir. 1973), render enforcement of the McKee-G.C.S. forum-selection clause discretionary, even assuming McKee only had requested transfer of the third-party action and not a stay as well.* As G.C.S. admits (G.C.S. Brief, at 11), in *Plum Tree* the Third Circuit indicated that a valid and reasonable forum-selection clause would be treated as a waiver of a party's right to assert its own convenience as grounds for avoiding trial in the contractual forum. 488 F.2d at 758. Since (1) McJunkin consented to enforcement of the clause, (2) Judge McMillen has held that the clause is valid and reasonable and that trial of disputes arising out of the McKee-G.C.S. subcontract will be more convenient in Illinois, and (3) under *Plum Tree*, the inconvenience a single trial of those disputes might cause G.C.S. is immaterial, nothing was left to Judge Snyder's discretion.

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* In fact, *Plum Tree* involved a situation identical to that faced by Judge McMillen in the *McKee case*: a defendant seeking to transfer a lawsuit out of a district despite a forum-selection clause between the parties which provided that their disputes would be resolved in that district. When the district court ordered the lawsuit transferred without considering either the validity of the clause under *Bremen* or any of the factors specified in 28 U.S.C. §1404(a), the Third Circuit vacated the transfer order and directed the district court to judge the validity of the clause as required by *Bremen* and then to rule on the transfer request as prescribed by the statute. 488 F.2d at 756-57. In view of Judge McMillen's prior evaluation of these factors, nothing in *Plum Tree* can be construed as justifying a second review of these factors by Judge Snyder and his reaching a result contrary to Judge McMillen's. *Accord, Ellicott Mach. Corp.* v. *Modern Welding Co.*, 502 F.2d 178, 181 (4th Cir. 1974).

The lower courts' refusal to enforce the McKee-G.C.S. forum-selection clause was not discretionary simply because motions for severance, transfer, or stay are normally left to trial courts. The decisions of the courts below are in direct conflict with the holding of *Bremen* and the policies behind it.

III.

THE THIRD CIRCUIT DID NOT DISMISS McKEE'S APPEAL FOR UNTIMELINESS.

G.C.S. implies in its Brief (at 7) that McKee's appeal was not from Judge Snyder's July 21, 1976 order and, therefore, that McKee's notice of appeal, filed August 11, 1976, was not timely. However, as noted in both the Petition (at 16) and the G.C.S. Brief (at 15), McKee's appeal was from Judge Snyder's refusal to stay the third-party action—a decision first entered on June 18, 1976 (App. 12), then reconsidered and affirmed on July 21, 1976 (App. 15-16). Thus, even if the appeal could be characterized as being taken from the earlier order, McKee's notice of appeal was filed within the additional thirty-day period for filing provided in F.R.App.P. 4(a). Under Third Circuit precedent, the appeal could not have been dismissed as untimely without first remanding the case to the district court for a decision on whether an extension should be granted. *Torockio* v. *Chamberlain Mfg. Co.*, 456 F.2d 1084, 1086-87 (3d Cir.) (en banc), *on remand*, 56 F.R.D. 82, 87-88 (W.D. Pa. 1972), *aff'd without opinion*, 474 F.2d 1340 (3d Cir. 1973). Therefore, G.C.S.'s suggestion that the Third Circuit dismissed McKee's appeal as untimely is not supported by the record.

CONCLUSION

This Petition presents two questions: (1) under this Court's decision in *Bremen*, can a party which cannot show that enforcement of a forum-selection clause would be unreasonable or unjust escape its agreement merely because the issue arises in the context of a third-party action? and (2) is a district court's refusal to enforce the clause in such a situation immediately appealable as of right? The prior decisions of the Illinois and Pennsylvania district courts in companion cases have resolved all subsidiary issues. There is no dispute that the instant clause is valid and enforceable as between McKee and G.C.S. There is no dispute that McKee's choice of the United States District Court for the Northern District of Illinois was reasonable, and that trial of the subcontract issues between McKee and G.C.S. can be had most conveniently in that forum. There is no real dispute * that the McKee-G.C.S. forum-selection clause expressly encompasses the claims asserted in the third-party complaint of G.C.S.

If permitted to stand, the lower courts' orders will result in expensive and duplicative litigation in at least two federal judicial circuits**—precisely what the McKee-

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* See p. 3 *supra;* App. 5a.

** *Cf. Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 384 (1953).

G.C.S. forum-selection clause was intended to prevent—with no chance of consolidating the trials or appeals. For this reason and for the reasons stated above and in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 21, 1977.

APPENDIX

APPENDIX 1A

Excerpt from Assignment of McJunkin valve purchase order to G.C.S., dated April 22, 1974.

B/M 03-02-09 SUPPLEMENTAL SHEET NO. 1

This supplemental sheet is being issued to assign this purchase order to McKee's Piping Subcontractor on this Project, General Contracting Services Inc. (GCS). The consignment of all valves on the order is:

General Contracting Services Inc.
700 Elizabeth—Glassport Rd.
(Mailing address is P.O. Box 417)
Elizabeth, Pa. 15037
Phone: 412-384-4774

and the address for invoicing is:

General Contracting Services Inc.
3755 Library Rd.
Pittsburgh, Pa. 15234
Mr. Robert W. Christensen
Phone: 412-563-7900

McKee will continue working with you on the expediting of the valves on this order.

APPENDIX 2A

Excerpts from McKee-G.S.C. subcontract, dated April 25, 1974.

Page 4:

McKee Bill of Material 03-02-09 showing valves purchased by McKee is included for reference. Valves as shown have been pre-purchased by McKee who will also expedite valves. G.C.S. will receive and pay for all valves on this B/M as required for the installation of piping systems. G.C.S. will also order, purchase, expedite, receive and install any new valves required for the installation of the piping system as shown on McKee's Flow Sheet drawing.

Page 12:

ACCEPTANCE OF ORDER

We are sending you this order in duplicate with the request that you sign one copy and return it to us as your acceptance of all terms and conditions as set forth in this order.

It is understood and agreed that this contract may be revised from time to time to add or deduct material or to make other running changes in accordance with our usual practice or issuance of "Supplemental Sheets". If, for any reason, you object to the content of any of the aforementioned Supplemental Sheets, you shall notify us in writing within ten (10) days after receipt of same, giving reason for objection. Unless we receive this written objection, it shall be considered that the revisions are in accordance with the original order.

ACCEPTED:

By: /s/ Wm. G. Bergmark
Title: Pres. I.S.C. and Subsidiaries
Date: 4/25/74

APPENDIX 3A

Excerpts from hearing on April 30, 1976 in Pittsburgh, Pennsylvania before the United States District Court for the Western District of Pennsylvania.

MR. HARRIS[*]: It seems to me, Judge, that it will just—you know, try as hard as the Court would, I am sure, to keep the issues in this case simple and limited to the McJunkin complaint issue, it seems to me there is no way you do that involving McKee because McKee's defenses to the third-party complaint are all of the issues in the Chicago case. That is, we did not goof up the engineering. G.C.S. says to Your Honor, "If we have to pay for the McJunkin valves, McKee has to pay us because McKee goofed up the engineering." That issue right there is worth about three weeks of trial. In Chicago this issue of whether or not the engineering was faulty, whether or not if it was faulty it caused G.C.S. to order valves that it did not need, and, of course, the ultimate contract question, that if the engineering was faulty and if G.C.S. then ordered valves as a result of that faulty engineering, who has to pay for those valves under the McKee-G.C.S. contract. Those are all the issues in the Chicago case.

If we were to go to trial on the third-party complaint here, I would have to present extensive evidence to Your Honor in the way of setoffs saying even if Your Honor finds on some basis that McKee is liable to G.C.S. for something, for some value, we have several hundred thousand dollars of other claims in Chicago. We are entitled to assert those as a setoff to any liability that the Court might feel we had to G.C.S. in this case, and that would

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[*] Counsel for petitioner Arthur G. McKee & Company.

drag in, by way of the back door, all of those other Chicago issues which will involve very extensive litigation.

• • •

[THE COURT*:] Now, you make the statement here: "it is the retention of the third-party complaint which threatens to bury the McJunkin purchase order claims among unrelated issues."

MR. HARRIS: Well, let me explain what we intend to convey with that statement, Judge.

If the case before Your Honor is just McJunkin's complaint against G.C.S., and G.C.S.'s answer and counterclaim, then the only issues, as the Court pointed out at the outset, are: did McJunkin sell valves; did they deliver valves; did G.C.S. pay for them; and did McJunkin and G.C.S. have an agreement that valves could be returned. Very simple issues.

THE COURT: But, do you think that there would be any justice either to McJunkin or G.C.S. to limit the issues that way?

MR. HARRIS: Sure. That would seem to me to be the procedure that would be the clear justice for all of the parties. It is only when the contractual issues between G.C.S. and McKee come into the case that the case becomes very very complicated, and we have this risk that Your Honor will make a decision on a factual issue that perhaps will bind us in Chicago.

THE COURT: That just might.

MR. HARRIS: Sure, sure.

THE COURT: Just might.

And wasn't G.C.S. the assignee of the McKee purchase order?

MR. HARRIS: Yes, sir.

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* Respondent Hon. Daniel J. Snyder, Jr.

THE COURT: So that when you try to saddle G.C.S., you are trying to saddle them with the liability on the purchase order without any defense as to the relationships between G.C.S. and McKee.

MR. HARRIS: Well, Judge, you know, that is the issue that is involved in the two Chicago cases, the contractual issue.

THE COURT: It is the issue involved here too.

MR. HARRIS: That is right, Judge, and that is our point, that it ought not to be involved here. We have a contractual right to have the issues between G.C.S. and McKee under that contract tried in Chicago.

THE COURT: No, you have the contractual right to have claims between G.C.S. and McKee determined in Chicago.

MR. HARRIS: Yes, sir.

THE COURT: And if you notice, I cited a previous opinion of this Court on this whole choice, and I go for it very strongly because I think people have the right to so contract. But here was a prior purchase order. As I understand it, the purchase order was prior to the contract selection clause, and that contract selection clause never said anything about the claims of third parties growing out of contracts previously existing.

MR. HARRIS: That is incorrect, Judge, and let me explain why. The first purchase order was the McKee purchase order to McJunkin, and that did predate the G.C.S.-McKee contract. When the contract then was put together between McKee and G.C.S. with the forum selection clause, it was written into the contract that that valve order was assigned from McKee to G.C.S., and that G.C.S. accepted that assignment. That is in the contract between McKee and G.C.S., within the same four corners.

THE COURT: Binding how on McJunkin? We are not talking about what G.C.S. agreed to; we are talking about what McJunkin agreed to.

• • •

THE COURT: The amazing thing to me about this is that originally, at least, McJunkin also consented to the motion.

MR. HARRIS: Well, they consented not to the motion to send everything to Chicago—

THE COURT: No, I know.

MR. HARRIS: —they consented to the motion to sever and transfer. And I would guess if the Court would ask Mr. Houston[*] why he did that, why he consented, and why maybe he would consent again today—but I don't know—is that he doesn't want me out here in Pittsburgh spending three months trying the contractual issues between McKee and G.C.S. in his simple little valve case.

THE COURT: Well, it seems to me if everybody agrees, I wouldn't have any problem about transferring it. I seem to see or sense some dispute.

MR. HARRIS: Well, the dispute, though, Judge, is only between us and G.C.S. G.C.S. does not want the third-party complaint to go to Chicago.

THE COURT: They apparently want to try it twice.

MR. HARRIS: Yes, I am afraid they do. And I submit to the Court that you ought not to facilitate that not only because of the burden it will cause to me and to my client, but because of the burden that it will impose upon the Federal District Court in Chicago who will have to try to figure out what factual issues Your Honor has decided, what factual issues by way of res judicata or collateral estoppel are already decided as a result of this Court's decision in the third-party complaint. Those questions will not be questions that we and G.C.S. will agree upon, and the Federal District Court in Chicago then will have to review what Your Honor has done in the third-party complaint so that the Chicago court does not review Your

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* Counsel for respondent McJunkin Corporation.

Honor's decisions. Of course, the Court would not do that in Chicago anymore than Your Honor would purport to review district court judgments from Chicago. All of these issues will place an intolerable burden, I submit, upon us, my client, and I think upon this court and upon the Federal District Court in Chicago. It is only by severing out the third-party complaint and the issue, all of which involve the McKee-G.C.S. contract and performance thereunder, and getting those out to Chicago where they can all be tried at one time.

Valves are only a small part of the litigation. Valves are just material, one kind of material. There are excess materials of another kind, and the issues are all the same.

Does my client, McKee, bear a responsibility for excess material, whether it is valves, in this case, or pipe in the Chicago case, or something else in the Chicago case; does my client have to pay for that excess material because we goofed up the engineering.

• • •

MR. KLABER[*]: Well, but we don't see why G.C.S. should be punished for the fact that a third-party action was brought by McJunkin in this jurisdiction. We certainly have the right to bring in all parties who are responsible over for any liability that G.C.S. may be found to have, and that is all we are asking to do. Apparently McKee is alleging, or suggesting a parade of horribles. I don't see how this lawsuit is going to have a lot of different tangents. True, engineering, is a small part of it.

THE COURT: I am afraid I can. I don't know.

MR. KLABER: The engineering, as to the valves, is only a small part of it. That doesn't require three weeks of trial.

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* Counsel for respondents G.C.S., Inc. and I.S.C., Inc.

THE COURT: But that isn't, as I understand it, that isn't what the third-party complaint is about. The third-party complaint in effect says, "Oh, but sure we got a bunch of these valves, but we couldn't use them. We had to ship them back. And the reason that we did, that we had to ship them back, was because of engineering mistakes."

MR. KLABER: Well, that is part of it.

THE COURT: Sure, that is part of it.

MR. KLABER: But it is a small part of it.

THE COURT: But then don't you get into the whole problem of what engineering mistakes which may have been in connection, for example, with other subcontractors work and had nothing to do with McJunkin?

MR. KLABER: That would be irrelevant. I don't see how that would get involved, Your Honor. I think the only question on engineering would be those valves which are involved in the McJunkin suit. If counsel wants to go beyond that, that is his choice, but I don't see that it is appropriate.

THE COURT: I think it would be though, but—

MR. KLABER: The only liability over would be imposed upon engineering related to this job, I guess.

THE COURT: Except insofar as affected by other engineering.